
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

Case No. 85-ERA-35
RUDOLF A. NORMAN,
Complainant

v.

NIAGARA MOHAWK POWER CORP.,
Respondent

Case No. 85-ERA-36
JOHN E. RYAN,
Complainant

v.

NIAGARA MOHAWK POWER CORP.,
Respondent

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For the Complainants

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For the Respondent

Before: ROBERT J. FELDMAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

These are consolidated proceedings to impose remedial and compensatory sanctions under Section 210 (the Employee Protection provisions) of the Energy Reorganization Act (42 U.S.C. § 5851).

Under date of June 12, 1985, each of the above-named Complainants filed a so-called "whistle-blower" complaint with the Department of Labor against the Respondent, his employer.* Each of them alleged that Respondent had violated Section 210 of the Act by depriving him of two days' pay (Norman in the amount of $418.54; Ryan in the sum of $298.52) in retaliation for making adverse reports in the course of activities in the Quality Assurance Program.

After investigation, the Assistant Area Director, Wage and Hour Division, notified the parties of the results in letters dated August 16, 1985. In each case, he made the following finding:

> As the result of our investigation, we find that the deduction of two days pay from your May paycheck did not constitute a discriminatory action. Rather, these days were not paid for because you did not obtain prior supervisory approval for your period of absence, as required by company policy.

Thereafter Complainants duly appealed by telegrams dated

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August 16, 1985 to the Chief Administrative Law judge. A hearing thereon was held by the undersigned on September 6, 1985, in Syracuse, New York. Upon motion duly made and granted, the proceedings were consolidated at the outset of the hearing. Subsequent to the filing of the transcripts and post-hearing briefs, the record was closed on October 11, 1985.

Findings of Fact

1. Respondent is a licensed nuclear power plant operator and the holder of a permit to construct a further nuclear power plant. Its plant at Nine Mile Point, unit 1 in Oswego, New York is in operation, and its nearby Unit 2 is under construction.

2. Complainant Norman was originally employed by Respondent in the 1960s for a period of about three years. After working elsewhere, he returned in 1975 and has worked for Respondent continuously for the past 10 years. He is presently employed as a senior hydraulic engineer in Respondent's Hydroelectric department.

3. Complainant Ryan has been employed by Respondent since August, 1982. He is a public relations specialist and since April 1, 1985 has been assigned to Respondent's Economic Development department.

4. In late 1983 and the year 1984, both Complainants were assigned to the Quality Assurance Program and were members of a group that conducted a management audit of Respondent's construction activities at Nine Mile Point Unit 2. The audit, known as Audit No. 4, resulted in draft reports containing 29 major findings of non-conformances or deficiencies.

5. Some seven exit critiques of the Audit were held, and at the direction of Respondent's Vice President Dise, the draft report was turned over to others and rewritten. It was reduced to a total of only eight findings.

6. Audit No. 4 was brought to the attention of the Nuclear Regulatory Commission (NRC), and in May, 1984, both Complainants and Anthony Laratta, a lead auditor, were contacted by the NRC representative for Nine Mile 2 and were subsequently called to testify in its investigation.

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7. On March 22, 1985, the Complainants and Laratta commenced a civil action in the United States District Court for the Northern District of New York against the Respondent and a number of its associates and executives, asserting a private cause of action under 42 U.S.C. § 5851 based upon the initial findings of Audit No. 4, Respondent's alterations to the draft report, and subsequent harassment of the plaintiffs in that action. The aggregate damages claimed by the three plaintiffs was $21,000,000.00.

8. Following the filing of the civil action complaint on Friday, March 22, Complainant Ryan checked out a company car from Respondent's Transportation department, stating as his destination the Nine Mile Point Unit 2 site, and describing the work as "#4 Audit follow-up - QlP". Later that day Complainants and their attorney used the car to serve the civil action complaint upon some of the individual defendants. Complainant Ryan kept the car over the week-end and still retained it on Monday, March 25.

9. Both Complainants notified their departments on Monday morning, March 25, that they would be away from work to consult with their attorney. They met sometime later at their attorney's office in Syracuse, and at or about 2:00 p.m. of that day, it was decided that all three of them would go to Washington in order to confer with Mr. Udell, counsel to the Congressional Oversight Committee on Nuclear Energy, who was said by their attorney to be interested in learning about their lawsuit. After making necessary personal arrangements, the Complainants and their lawyer then drove to Washington in the company car that Complainant Ryan had checked out the previous Friday.

10. Neither of the Complainants had obtained any permission or consent from his supervisor, or from any other official of the Respondent, to go to Washington.

11. Before leaving Syracuse on Monday, Complainants telephoned their respective supervisors, but did not reach them. Complainant Ryan left word with a non-supervisory employee that he was going to Washington. On Tuesday morning, March 26, enroute to Washington, Complainant Norman telephoned his supervisor and told him that he was still with his attorney and would not be in that day, but did not disclose that he

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was on his way to Washington.

12. While in Washington, Complainants and their counsel discussed the subject of their civil action with Mr. Udell. They had no contact with any representative of the NRC and did not appear before any congressional committee in response to subpoena, invitation, or otherwise.

13. Complainants returned to Syracuse on Wednesday, March 27. They did not report for work until the following morning.

14. At some point prior to returning the company car, Complainant Ryan had endorsed on the Car Release & Mileage Record a second trip as follows: "Number of passengers - 3; Destination - Washington, D.C.; Description of Work - U.S. Federal Court Actions".

15. Between March 22, 1985 and March 27, 1985, the company car had been driven a total of 1120 miles. Gasoline had been charged on a company credit card.

16. Upon his return to work, Complainant Ryan was advised by memorandum dated March 27, 1985 from the Supervisor, Corporate Audits, that his use of the company vehicle on March 22, 23 and 24th was in direct violation of company policy; and was further advised in such memorandum that because of his failure to call his immediate supervisor for approval of taking two days to go out of town with his attorney, such time off was not approved as an excused absence. Complainant Norman was orally advised by his supervisor to similar effect.

17. On Friday, March 29, 1985, Complainant Ryan, accompanied by Complainant Norman and their attorney, met with a Mr. Anselment, Respondent's Employee Relations manager in Syracuse, and Mr. Swartz, its Employee Relations manager for the Western region. The purpose of the meeting was to discuss Complainant Ryan's transfer (in accordance with his earlier request) to Respondent's newly formed Corporate Development department. In the course of the meeting, the question of the trip to Washington was brought up. Mr. Swartz stated that time devoted to NRC hearings and Department of Labor hearings would be paid for, but time taken off to pursue Complainant's

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own lawsuit would not be paid for. Although indicating that Complainants' protest against being "docked" for their time in Washington would be considered, neither Swartz nor Anselment gave any assurance or made any commitment to the effect that Respondent would pay Complainants for their time away from their jobs on March 26th and 27th.

18. On April 1, 1985 a meeting of supervisory and executive personnel met with Respondent's house counsel and decided to limit Complainants' pay reduction to two days (March 26th and 27th) rather than the three days orginally contemplated.

19. By memorandum dated April 10, 1985, Respondent's Vice-President for Engineering advised Complainant Norman that his April 19, 1985 paycheck would be reduced by two days to reflect his unauthorized trip to Washington, D.C. on March 26 and 27, 1985.

20. On May 1, 1985, Complainant Norman observed that his paycheck for the month of April had been reduced in the amount of $418.54.

21. On May 3, 1985, Complainant Ryan observed that his paycheck for the month of April had been reduced in the amount of $298.52.

22. As of the end of March, 1985, each of the Complainants believed he had informally accumulated more than two days of "compensatory time" (presumably, voluntary unpaid overtime), which at the discretion of his supervisor could have been resorted to for the purpose of covering his absence from work on March 26 and March 27, 1985.

23. No disciplinary action was taken and no penalty was imposed; Complainants were simply not paid for two days of absence without leave.

24. On May 20, 1985, Chief Judge Munson dismissed Complainants' civil action on the grounds that Congress had granted no private cause of action to redress grievances by nuclear industry employees in a Federal court, and that Section 210 of the Act provides a

comprehensive administrative procedure under the auspices of the Secretary of Labor which

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cannot be circumvented by resort to the Federal court in the first instance.

25. On June 12, 1985, Complainants commenced this proceeding for relief under Section 210.

Discussion

Upon the foregoing material facts that have been found from the evidence adduced herein, two questions are presented: Was this proceeding timely brought? If so, did Respondent charge each complainant with two days' pay in retaliation for engaging in a protected activity?

I. Limitation of Action

Section 210 provides in pertinent part as follows:

> Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation on subsection (a) may, *within thirty days after such violation occurs*, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. [42 U.S.C. § 5851 (b)(1)] (emphasis supplied)

The timeliness of a discrimination claim is measured from the date the Claimant received notice of the allegedly discriminatory decision, not from the date the decision takes Affect. *Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State College v. Ricks*, 49 U.S. 250 (1980); *O'Malley v. GTE Service Corp.*, 758 F.2d 818 (2nd Cir. 1985).

The final and definitive decision to deduct two days (March 26, 27) from complainants' paycheck was made at the meeting of supervisory and executive personnel on April 1, 1985. Complainant Norman was notified of that decision by formal memorandum on April 10, 1985. Though Complainant Ryan disclaims any knowledge of the decision prior to his receipt of his paycheck for the month of May, there is no doubt that each of the

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Complainants became aware of the implementation of that decision upon receipt of his wages for the month of April in the reduced amount (Norman on May 1, 1985, and Ryan on May 3, 1985).

Complainant Ryan's protestations of ignorance of any determination to dock him for two days' pay are unpersuasive in fact and insufficient in law. Bearing in mind that at the March 29 meeting with Anselment and Swartz, he was obviously aware that the pay deduction was contemplated. It is most improbable that the subsequent determination to impose the deduction did not come to his attention. Certainly, he knew by May 3 that the two days' pay docking was a *fait accompli*, and that his request to Anselment and Swartz for reconsideration had been unsuccessful. He knew then the adverse employment action had been taken; at best, all he could have hoped for was a reversal of the position previously taken or a restoration of the monies deducted. Thus, the thirty-day limitation began to run on May 3, 1985 and the commencement of these proceedings on June 12 was not timely.

It is noted, however, that the timely filing of a charge of discrimination is not a jurisdictional prerequisite to suit, but a requirement that, like a statute of limitation, is subject to waiver, estoppel, and equitable tolling. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). That principle as been specifically applied to Section 23(a) 1,(3)(b) of the Toxic Substances Control Act, which is virtually identical to the corresponding language of Section 210 of the Energy Reorganization Act. *School District of City of Allentown v. Marshall*, 657 F.2d 16 (3rd Cir. 1981).

Complainants contend that the thirty-day limitation is not applicable because they alleged a retaliatory course of conduct or series of continuous violations, citing *Ellis Fischell State Cancer Hospital v. Marshall*, 629 F.2d 563 (8th Cir. 1980). The case cited, however, is inapt. No issue of timeliness in the bringing of the proceeding was raised in that case; rather it dealt with the extent of the remedy for a series of retaliatory acts over a period of some eight months. Moreover, it is found that time limitations for bringing discrimination actions are not tolled by allegations of continuing violation. See *Alveari v. American International Group, Inc*. 590 F.Supp. 228 (S.D.N.Y 1984); *Lyda v. American Broadcasting Companies, Inc.*, 587 F.Supp 670 (S.D.N.Y. 1984); see also Schlei and Grossman, *Employment Discrimination Law* 1047 (2nd ed.).

Complainants also contend that because of their discussion with Anselment and Swartz on March 29 relative to reconsidering the proposed two-day deduction, the thirty-day period should not be deemed to begin until such time as they were satisfied that the deduction which had taken place at the end of April would not be restored to them. Any such equitable tolling, however, is restricted to situations in which the employee was actively misled by his employer, or was prevented in some extraordinary way from exercising his rights, or he asserted his rights in the wrong forum. *Smith v. American President Lines, Ltd.*, 571 F.2d 102 (2nd Cir. 1978).

The record herein contains no evidence of any of those conditions. Moreover it is apparent that both Complainants have had the advice of counsel throughout the course of pertinent events in this proceeding, and their negotiations to adjust the controversy cannot be used against the Respondent to toll the statute. See *Miller v. International Telephone and Telegraph Corp.*, 755 F.2d 20 (2nd Cir. 1985); *Pfister v. Allied Corp*, 539 F.Supp. 224 (S.D.N.Y. 1982).

Conclusion of Law

Accordingly, the 30-day limitation has not been waived or tolled herein, and no evidence has been adduced to show that Respondent should be estopped from asserting it. Since these proceedings were not commenced within 30 days after Complainants became aware of Respondent's allegedly discriminatory decision to dock them for two days' pay, the consolidated proceeding is time-barred and must therefore be dismissed.

II. Evidence of Alleged Protected Activity

In view of the foregoing conclusion that both proceedings were not timely brought and must be dismissed for that reason, there should be no necessity for discussing the question of whether it has been established on this record that a violation of Section 210 has occurred. It is not inappropriate, however, to express briefly my view that dismissal on the ground of untimely filing results in no injustice whatsoever in this case, because Complainants were not engaged in a protected activity while in Washington and thus cannot prevail on the merits.

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Employee Protection provisions are included in statutes enacted in the interests of public safety and health, such as the Safe Drinking Water Act, the Water Pollution Control Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, and of course, the Energy Reorganization Act of 1974. Their manifest purpose is to safeguard the job security of employees who participate in exposing or correcting conditions that endanger the public weal in violation of other provisions of the statute to which they apply. The protection they afford, however, is limited to activities in the public interest and is not extended to actions for private gain. Surely Section 210 of the Act cannot be reasonably construed to require an employer to subsidize a two or three day trip to Washington (on company time and in a company vehicle) by two of its employees in furtherance of their multi-million dollar damage suit against that employer!

Analysis of the evidence reveals that the indisputable motivating factor in the decision to deduct two days' pay was Complainants' unauthorized journey to Washington for the express purpose of discussing their recently filed lawsuit with committee counsel Udell, the nature of whose interest therein, if any, does not appear in the record. It is clear, however, that they did not make the trip to assist or inform the N.R.C., nor to appear in any hearing or investigation. Whatever they expected to accomplish was inextricably tied

to the advancement of their private civil action, which has since been determined by Chief Judge Munson to be not maintainable under Section 210 or otherwise. *Ergo*, the Washington excursion was not a protected activity under the Act and Respondent's adverse action in response thereto is not proscribed by any provision of the Act.

Conclusion of Law

The evidence adduced herein does not establish that Respondent's deduction from Complainants' paychecks for the month of April, 1985, was in violation of Section 210 of the Act.

RECOMMENDED ORDER

For the reasons above stated, I recommend that the proceedings as consolidated herein be dismissed.

ROBERT J. FELDMAN

Administrative Law Judge

Dated: OCT 31 1985
Washington, D.C.

[ENDNOTES]

[*] Although the Assistant Area Director for the Department of Labor in Albany, New York indicates that the complaint was received on July 29, 1985, it is not disputed that both letters of complaint dated June 12, 1985, were mailed on that date to an official of the Department of Labor in Washington, D.C. Consequently, June 12, 1985, is deemed to be the date of filing both complaints. See 29 C.F.R. § 24.3(b).